

**Rep. Ted S. Yoho (FL-3) written testimony Mar 01 2016 "Member Day -
National Defense Priorities from Members for the FY 2017 National Defense
Authorization Act"**

Thank you Chairman Thornberry and Ranking Member Smith for the opportunity come and speak before this committee. This is a great opportunity you are affording Members of Congress who do not serve on Armed Services.

Today I would like to speak to you about the transfer of property and detainees from the Guantanamo Bay Naval Base.

As I am sure you know, it is currently illegal for the President to transfer detainees from the base to the United States. But the actual base itself can be transferred back to the Castro government without the consent of U.S. government. Recently the Castro government demanded that in order for normalization to continue between Cuba and the United States, the Guantanamo Bay Naval Base must be transferred back to Cuba.

The 1903 lease agreements between the governments of Cuba and the United States are controlled by the language of a 1934 treaty stipulating that the lease can only be modified or abrogated pursuant to an agreement between the United States and Cuba. The territorial limits of the naval station remain as they were in 1934 unless the United States abandons Guantanamo Bay or the two governments reach an agreement to modify its boundaries.

While there appears to be no consensus on whether the President can modify the agreement alone, Congress is empowered to alter by statute the effect of the underlying 1934 treaty. A statute passed later than a treaty is recognized to supersede the terms of the treaty to the extent that they are inconsistent, at least as far as domestic law is concerned. Although not firmly established, it seems likely that Congress could override any implications that might be drawn from the 1934 treaty with respect to presidential authority to modify the Guantanamo lease by enacting legislation specifying that any such modification must be accomplished with the advice and consent of the Senate or the concurrence of Congress.

In fact, Congress has passed legislation establishing policy with respect to the Guantanamo leases. As part of the Cuban Liberty and Democratic Solidarity Act (LIBERTAD, P.L. 104-114), Congress established that the policy of the United States is to be "prepared to enter into negotiations with a democratically elected government in Cuba either to return the United States Naval Base at Guantanamo to Cuba or to renegotiate the present agreement under mutually agreeable terms." The provision appears to approve negotiations by the President with a democratic Cuban government over the possible return of Guantanamo Bay, but it does not explicitly approve the entry into such an agreement as a congressional-executive agreement. Moreover, it does not expressly prohibit the negotiation of lease modifications with the existing government of Cuba.

It can be argued that an executive agreement with Cuba to close the base would in effect amount to an executive agreement pursuant to the 1934 treaty and would thus not require the advice and consent of the Senate.

In order to protect against this potential unilateral action by the President, I introduced H.R. 4126, the Guantanamo Transfer Prevention Act, which among other things would prevent the President from unilaterally ceding the base back to the Castro government without the advice and consent of Congress. While I work to move my stand-alone bill I wanted to take this time to urge the Armed Services Committee to take similar actions in protecting against this potential for executive action and to ensure that the President must come to Congress.

Thank you for your time.