

CONFIDENTIAL -- MEMORANDUM RE: Lawsuit seeking an injunction against the Federal Government to prevent transfer of Guantanamo detainees to Fort Leavenworth, Kansas

- **The Law:** The federal government is prohibited by law from using any funds to “construct or modify” any facility in the United States to house Guantanamo detainees, or even to use any funds to “assist in the transfer” of the detainees to the United States. See Sections 1033 & 1034 of the National Defense Authorization Act, 127 Stat. 850, 851. This language has been contained in every defense funding bill since FY2011, and currently is set to expire on December 31, 2015. President Obama vetoed the new defense funding bill, in part because it contained the same language, on October 22, 2015.
- **The Facts:** Notwithstanding these specific prohibitions of federal law, the United States is using funds for the express purpose of transferring the Guantanamo detainees to the State of Kansas. In particular, DOD Secretary Carter directed an “assessment team” to survey Fort Leavenworth, Kansas, “to determine the costs of housing detainees, in addition to assessing the facilities for force protection, troop housing, security, transportation, information security, contracting and other operational issues.” DOD Press Release dated 9/22/15; see also DOD Press Briefing Transcript dated 9/3/15. South Carolina and Colorado locations also have been “surveyed” as potential detainee transfer sites, and thus those states would have the same claims as Kansas.
- **The Defense:** The Justice Department almost certainly would assert a constitutional defense to any lawsuit by Kansas. Although President Obama signed these prohibitions into law, he has issued signing statements indicating that the provisions would violate constitutional separation of powers principles under certain circumstances. See, e.g., Statement by the President on H.R. 3979 dated 12/19/14. The administration position is that transfer of the detainees is a matter within the executive powers of the President, thus the statutory prohibitions may be ignored. This was made clear in the President’s recent veto message on the defense funding bill: “The executive branch must have the flexibility, with regard to those detainees who remain at Guantanamo, to determine . . . when and where to transfer them consistent with our national security and humane treatment policy.” President’s Veto Message on H.R. 1735 dated 10/22/15.