



PROTECT THE CONSTITUTION.

VOTE “NO” ON COTTON AMENDMENT.

June 19, 2014

RE: Cotton Amendment Is an Unconstitutional Bill of Attainder

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Dear Representative:

The American Civil Liberties Union strongly urges you to vote “NO” on the Cotton amendment to the defense appropriations bill. The Cotton amendment violates the bedrock constitutional prohibition on Congress passing any bill of attainder. Regardless of whether you support or oppose closing the Guantanamo prison,¹ the ACLU urges that all members uphold the Constitution and vote “NO” on passing an unconstitutional bill of attainder.

The Cotton amendment would bar the use of all funds under the bill for any overseas transfers of detainees held at Guantanamo. When combined with the existing ban on transfers to the United States, as well as the government’s position that overseas transfers require expenditure of DOD funds, the effect of the Cotton amendment would be a complete ban on transfers of detainees out of Guantanamo--in violation of the Constitution.

Article I of the Constitution provides that “[n]o bill of attainder or ex post facto law shall be passed” by the Congress. U.S. Const. Art. I, § 9, cl. 3. In interpreting the Bill of Attainder Clause, the Supreme Court has held that “legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.” United States v. Lovett, 328 U.S. 303, 315 (1946). In Lovett, the Court specifically found that an appropriations provision cutting off funding can be a bill of attainder because cutting off funds is “no less galling or effective than if [the punishment] had been done by an Act which designated the conduct as criminal.” Id. at 316.

Courts rarely invoke the constitutional prohibition on bills of attainder because Congress rarely identifies its specific targets for punishment in legislation. However, in response to such highly unusual legislation, the Court has invalidated

¹ The ACLU joined a coalition of human rights, civil liberties, and religious groups in sending a separate letter to the House urging opposition to any additional restrictions on transfers. The ACLU is writing this letter separately to explain the danger of the Cotton amendment as violating the Bill of Attainder Clause of the Constitution.

those statutes. See, e.g., United States v. Brown, 381 U.S. 437 (1965); Lovett, 328 U.S. 303; Ex Parte Garland, 71 U.S. 333 (1866). In those cases, the Court emphasized “that Congress must accomplish [its] results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied.” Brown, 381 U.S. at 499. By naming a target instead of setting rules of general applicability, Congress impermissibly usurps the powers of the Executive Branch and the Judicial Branch. Lovett, 328 U.S. at 314.

The Cotton amendment, which effectively is a complete ban on transfers out of Guantanamo, would be a bill of attainder. As the Supreme Court explained in Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977), the Bill of Attainder Clause prohibits Congress from passing “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” The three elements of a bill of attainder are “[1] specification of the affected persons, [2] punishment, and [3] lack of a judicial trial.” Selective Serv. Sys. v. Minn. Public Interest Research Group, 468 U.S. 841, 847 (1984). The Cotton amendment is unconstitutional because it would meet each prong of this three-prong test.

First, the Cotton amendment would satisfy the specificity prong of the inquiry because the amendment singles out an identifiable group of people for differential treatment: those individuals currently detained at Guantanamo. There are exactly 149 specifically identifiable men affected by the Cotton amendment.

Second, because the Cotton amendment would effectively be a complete ban on transfers, it would constitute punishment because it would effectively prohibit detainees from leaving the Guantanamo prison, regardless of whether it is lawful or unlawful to detain the individuals. Legislatively enforced continued imprisonment or confinement to Guantanamo would, in fact, constitute punishment more severe than any punishment held to be unconstitutional under any of the bill of attainder challenges decided by the Supreme Court during its entire 225-year long history--none of those decisions involved any person being actually imprisoned or having his or her release from imprisonment blocked.

Third, the “lack of a judicial trial” element would be met because the detainees would be subject to enforced legislative imprisonment, regardless of guilt or innocence. The Cotton amendment is without precedent in Congress itself deciding to categorically block release from detention of specifically identifiable individuals. The Constitution explicitly denied Congress this power.

The ACLU strongly and consistently urges members of Congress to vote against any legislation that would violate the Constitution’s protections afforded to individuals. While we recognize that there are conflicting views on Guantanamo detention policy, we urge all members to reject the Cotton amendment as a violation of the Bill of Attainder Clause of the Constitution.

Thank you for your consideration of this letter. Please do not hesitate to call us at 202-675-2308 if you have any questions regarding this amendment.



Laura W. Murphy
Director

Very truly yours,



Christopher E. Anders
Senior Legislative Counsel