



PROTECT THE CONSTITUTION.

VOTE “NO” ON S. 165--AN UNCONSTITUTIONAL BILL OF ATTAINDER.

February 11, 2015

RE: S. 165, Ayotte Guantanamo Bill Is an Unconstitutional Bill of Attainder

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Dear Senator:

The American Civil Liberties Union strongly urges you to vote “NO” on S. 165, a bill introduced by Senator Kelly Ayotte to block transfers out of Guantanamo. The Ayotte bill 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.

S. 165 would impose a two-year complete ban on all transfers of detainees held at Guantanamo, absent a court order. The two-year ban on all transfers would replace the current transfer restrictions that Congress enacted in December, which ban transfers to the United States, but allow transfers overseas based on exhaustive fact-specific determinations by the Secretary of Defense. By referencing outdated risk classifications *that cover all 122 detainees currently at Guantanamo*, S. 165 would effectively impose a two-year ban, which would be followed in 2017 by imposing transfer restrictions that a bipartisan majority of Congress, including Chairman John McCain, rejected 15 months ago. The two-year ban in S. 165 violates the Constitution.

The Constitution Prohibits Bills of Attainder

The prohibition against a bill of attainder is so fundamental to the Constitution’s principle of separation of powers and protection of due process that the drafters of the Constitution wrote it into the body of the Constitution itself. Every member of Congress has an obligation to uphold the Constitution by refraining from passing unconstitutional legislation.

¹ The ACLU is joining a coalition of human rights, civil liberties, and religious groups in sending a separate letter to members of the Senate Armed Services Committee, urging opposition to any additional restriction on transfer. The ACLU is writing separately to explain the danger of S. 165 as violating the Bill of Attainder Clause 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 have to consider the constitutional prohibition on bills of attainder because Congress rarely names its specific targets for punishment in legislation. However, in response to such highly unusual legislation, the Court has invalidated 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.

A classic test for a bill of attainder is, if someone can take pen and paper and write down the name of each and every person harmed by enactment of legislation, then it is a bill of attainder. While there may be other bills that also are bills of attainder, this classic test applies to S. 165. There are precisely 122 men subject to the congressionally-imposed two-year imprisonment in S. 165.

S. 165 is an Unconstitutional Bill of Attainder—Three Prong Test

S. 165 would be a bill of attainder because it is effectively a complete ban on transfers of a group of individuals out of Guantanamo. 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). S. 165 is unconstitutional because it would meet each requirement.

First, S. 165 would satisfy the specificity prong of the inquiry because the transfer provisions single out an identifiable group of people for differential treatment: those individuals currently detained at Guantanamo. There are exactly 122 specifically identifiable men affected by S. 165.

Second, because S. 165 would effectively be a complete ban on transfers for two years, it would constitute punishment because the legislation would prohibit detainees from leaving the Guantanamo prison, absent a court order. Legislatively enforced continued imprisonment or confinement to Guantanamo for two years would, in fact, *constitute congressionally-imposed punishment more severe than any punishment ever held to be unconstitutional under any of the bill of attainder challenges decided by the Supreme Court during its entire history*—none of those decisions involved any person continuing to be actually imprisoned or having his or her release from imprisonment blocked.

Third, the “lack of a judicial trial” element would be met because specific detainees would be subject to enforced legislative imprisonment, regardless of guilt or innocence. S. 165 is without precedent in Congress itself deciding to categorically block release from detention of specifically identifiable individuals. The Constitution expressly 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 there are conflicting views on Guantanamo detention policy, we urge all senators to reject S. 165 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 legislation.

Sincerely,



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