



VOTE “NO” ON H.R. 5351--AN UNCONSTITUTIONAL BILL OF ATTAINDER.

FLOOR VOTE WILL BE WEDNESDAY OR THURSDAY.

September 13, 2016

RE: H.R. 5351, Walorski Guantanamo Bill Violates the Constitution’s Bill of Attainder Clause

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Dear Representative:

The American Civil Liberties Union strongly urges you to vote “NO” on H.R. 5351, a bill introduced by Representative Jackie Walorski to block all transfers out of Guantanamo for the remainder of this year. The Walorski bill violates the bedrock constitutional prohibition on Congress passing any legislation that violates the Constitution’s Bill of Attainder Clause. Regardless of whether you support or oppose closing the Guantanamo prison, the ACLU urges that all members uphold the Constitution and vote “NO” on passing an unconstitutional bill of attainder.

KARIN JOHANSON
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

H.R. 5351 would impose a complete ban on all transfers of detainees held at Guantanamo, until the earlier of January 1, 2017 or the date of enactment of the next National Defense Authorization Act. The calendar year ban on all transfers would override the current transfer restrictions that Congress enacted earlier this Congress, which ban transfers to the United States, but allow transfers overseas based on exhaustive fact-specific determinations by the Secretary of Defense. The ban on transfers would apply even to the 20 detainees cleared for repatriation or resettlement overseas. Only 10 of the remaining 61 detainees at Guantanamo have been charged or tried for a crime.

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.

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 H.R. 5351. There are precisely 61 men subject to the congressionally-imposed yearlong imprisonment in H.R. 5351.

H.R. 5351 is an Unconstitutional Bill of Attainder—Three Prong Test

H.R. 5351 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). H.R. 5351 is unconstitutional because it would meet each requirement.

First, H.R. 5351 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 61 specifically identifiable men affected by H.R. 5351.

Second, because H.R. 5351 would effectively be a complete ban on transfers for the remainder of this year, it would constitute punishment because the legislation would prohibit detainees from leaving the Guantanamo prison, even if otherwise cleared and set for repatriation or resettlement overseas. Legislatively enforced continued imprisonment or confinement to Guantanamo for the remainder of this year 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 earlier 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. H.R. 5351 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 members to reject H.R. 5351 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,



Karin Johanson
Director



Christopher Anders
Deputy Director