



January 5, 2011

The Honorable Barack Obama
President of the United States
White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

RE: Guantanamo transfer provisions in H.R. 6523

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

LAURA W. MURPHY
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

Dear President Obama:

The American Civil Liberties Union strongly urges you to provide clear direction for all federal agencies that the Guantanamo transfer provisions of H.R. 6523, the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (NDAA), do not materially restrict the ability of the Departments of Justice, Homeland Security, or State to effect transfers of detainees from Guantanamo either for criminal trial in federal criminal court in the United States or for resettlement or repatriation in foreign countries. However, if you instead determine that the Guantanamo transfer provisions would materially restrict the ability of all federal agencies to effect transfers, then we strongly urge you to veto the legislation to avoid signing unconstitutional provisions into law.

Contrary to the characterization of the transfer provisions by some media reports and by several members of Congress, the Guantanamo transfer provisions, sections 1032 and 1033 of H.R. 6523, are not complete bans on transfer either to the United States for prosecution in federal criminal court or to foreign countries. Instead, section 1032 (on transfers to the United States) is a funding restriction limited to funds authorized to be appropriated by this particular NDAA, and section 1033 (on transfers to foreign countries) is limited to funds authorized to be appropriated by this particular NDAA or otherwise available to the Department of Defense (“DOD”). At most, the restrictions in the transfer provisions apply only to the expenditure of DOD funds.

Sections 1032 and 1033 do not prohibit the Department of Justice (“DOJ”) from using its own funds to transfer criminal defendants from Guantanamo to federal criminal court in the United States, and do not prohibit the Department of Homeland Security (“DHS”) or State from using their own funds to transfer detainees from Guantanamo for resettlement or repatriation in foreign countries. In other words, section 1032 does not prohibit DOJ from sending a plane with federal marshals to transport detainees from Guantanamo to federal criminal court in the United States for prosecution. Similarly, section 1033 does not prohibit DHS or the State Department from sending a plane to Guantanamo to transfer a detainee from Guantanamo to a foreign country. No NDAA-authorized funds, or any other DOD funds would be required for such transfers by other departments.

If Congress had intended to bar the use of all federal funds for detainee transfers, it certainly knew how to draft the language necessary for such a blanket ban. Congress chose not to do so in passing H.R. 6523. In several bills during the last Congress, legislation applied detainee transfer restrictions to all federal funds expended by all agencies. For example, starting with the war supplemental appropriations statute for Fiscal Year 2010, the Congress enacted or continued a ban—in five separate bills signed into law—on the use of all federal funds for transfer of Guantanamo detainees to the United States, except for prosecution. In fact, only a little more than a week before H.R. 6523 passed both houses of Congress, the House of Representatives passed a provision, in one version of a continuing resolution, which was nearly identical to section 1032 of H.R. 6523, except that it applied to all federal funds. In passing H.R. 6523, Congress chose instead the narrower route of restricting only the use of DOD funds to effect transfers. It did not extend the transfer restrictions to other federal funds used by other federal agencies.

The ACLU strongly urges you, therefore, to direct all federal agencies with instructions that the restrictions in sections 1032 and 1033 apply only to DOD, and do not materially restrict the ability of DOJ, DHS, or the State Department to effect transfers from Guantanamo to the United States or to foreign countries.

However, if you determine that the restrictions in sections 1032 and 1033 materially limit the ability of all federal agencies to transfer Guantanamo detainees to the United States for criminal trial or to foreign countries, then we strongly urge you to veto the bill. A complete ban on transfers would constitute unconstitutional legislation.

A ban, or material limitation, on transfers both to the United States and to foreign countries would be a bill of attainder, which the Constitution bars Congress from enacting. As the Supreme Court explained in *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977), the Bill of Attainder Clause in Article I of the Constitution 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 transfer provisions of H.R. 6523 are unconstitutional because they would meet each requirement.

First, H.R. 6523 would satisfy the specificity prong of the inquiry because the transfer provisions single out an identifiable group of people for differential treatment: foreign nationals who are not members of the United States military and were held at Guantanamo on or after January 20, 2009. There are exactly 174 specifically identifiable men affected by the transfer provisions.

Second, if the transfer restrictions, particularly when the two provisions are read together, are interpreted to act as a complete ban or material limit on transfers, they would constitute punishment because they effectively prohibit detainees from leaving their Guantanamo prison. 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 history—none of those decisions involved any person being imprisoned or having his or her release from imprisonment blocked.

Third, the “lack of a judicial trial” element would be met because the vast majority of detainees subject to enforced legislative imprisonment will not face trial. Only three Guantanamo detainees have been convicted of crimes, while 171 have never been tried for any crime. In fact, the government has stated that fewer than 40 of the detainees will ever be tried for any crime.

The ACLU strongly urges you to veto any bill presented to you that would violate the Constitution's protections afforded to individuals. If you determine that the transfer provisions of H.R. 6523 ban, or materially limit, transfers—even when effected by DOJ, DHS, or the State Department—then we strongly urge you to veto H.R. 6523.

Thank you for your consideration of this letter. We are available to discuss this matter further with your staff.

Sincerely,



Laura W. Murphy
Director



Christopher E. Anders
Senior Legislative Counsel