

CALLING OBAMA'S BLUFF ON HIS SIGNING STATEMENT

The ACLU has a fascinating letter to Obama pertaining to his signing statement threat. It basically calls his bluff on his “pretend” problems with Congressional restrictions on his ability to close Gitmo. It does this, first of all, by pointing out that the provisions were part of the National Defense Authorization Act, and therefore limit expenditures by DOD, but not expenditures by DOJ or DHS, which collectively could take on the supposedly prohibited activities.

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.

The letter goes on to point out the many times Congress has passed legislation that banned all expenditures tied to closing Gitmo. It even notes (addressing one of my concerns) that the House passed, but not the entire Congress, a more substantial ban in one of the versions of the continuing resolution. Congress knows how to ban all expenditures on closing Gitmo, the ACLU notes, but it chose not to do so.

But if Obama interprets the law to limit all expenditures on detainee transfers, the letter continues, then it would be an unconstitutional 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 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.

Now, IANAL, so I await bmaz’ take on this (because he loves to talk about Bills of Attainder). But I’m less convinced by this argument; I’m less convinced this argument would stand up in court.

I also think this part of the argument could be

stronger still. Doesn't Congress, by prohibiting the President from spending any money on Gitmo transfers, consign them to the imperfect justice system there? If so, why not note that?

Moreover, if—as ACLU argues—Congress' law equates to requiring detainees to stay at Gitmo, and if—as ACLU argues—"the 'lack of a judicial trial' element would be met because ... fewer than 40 of the detainees will ever be tried for any crime," then isn't the ACLU asking Obama to complain about Congress forcing him to indefinitely detain these detainees?

Mind you that argument has one technical problem: that this defense authorization only lasts for one year. So the law only requires Obama to "indefinitely" detain these men for one year.

But then there's the larger problem. Obama is on the verge of signing an Executive Order implementing an indefinite detention protocol himself. As increasingly incredible as his "pretend" efforts to close Gitmo may be, they're still far more credible than a complaint from Obama about Congress forcing him to, effectively, do what he's about to do via EO anyway.

Which is what this letter, at its best, seems to do: force Obama to admit that he's choosing to abide by this Congressional restriction because it forces him to do what he wants to do anyway.