HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HM 1609 Terrorist Trials in Civilian Courtrooms
SPONSOR(S): Fresen
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Policy Council	8 Y, 4 N	Liepshutz	Ciccone
2)	Rules & Calendar Council			
3)				
4)				
5)				

SUMMARY ANALYSIS

House Memorial 1609 urges the U.S. Congress to use its constitutional authority to prevent the trial of terrorists from taking place in a civilian courtroom.

The memorial provides for copies of it to be submitted to the President of the United States, the President of the U.S. Senate, the Speaker of the U.S. House of Representatives, and each member of the state's congressional delegation.

The memorial does not have a fiscal impact on state or local government.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

House Memorial 1609 expresses the Legislature's desire for the U.S. Congress to use its constitutional authority as specified in Section 1 of Article III of the United States Constitution, and to reject any efforts by the U.S. Justice Department to try terrorists in federal court in New York City or any other domestic venue.

The memorial expresses opposition to the use of the federal criminal courts to try "unlawful enemy combatants" detainees and implicitly supports instead the use of military tribunals or military commissions to try them.

The memorial provides for copies of it to be submitted to the president of the United States, the President of the U.S. Senate, the Speaker of the U.S. House of Representatives, and each member of the state's congressional delegation.

Both houses of the Florida Legislature must pass a memorial; however a memorial is not subject to gubernatorial approval or veto and upon its passage is sent directly to the specified congressional officials.[1]

Recent Actions by the 111th Congress, 2d Session[2]

Congressional legislation that directly addresses the subject of this memorial was recently introduced in the U.S. Senate and House. Senate bill 3081 (introduced 3/4/2010) by Senator McCain and its companion, House Bill 4892 (introduced 3/19/2010) by Rep. McKeon, prohibit the use of funds appropriated or otherwise made available to the Department of Justice (DOJ) to prosecute an alien "unprivileged enemy belligerent" in Article III federal courts. For purposes of the bill, an "unprivileged enemy belligerent" is defined as someone who:

[1] The Florida House, *Guidelines for Bill Drafting*, (2009) page 20.

[2] Research to obtain the information relating to actions of the 111th Congress was obtained using the Library of Congress, THOMAS available at http://thomas.loc.gov/home/abt_thom.html. THOMAS was launched in 1995, at the inception of the 104th Congress, which directed the Library of Congress to make federal legislative information freely available to the public. Information on Congressional legislation also obtained using NetScan, available to subscribers at http://www.netscan.com/

- Has engaged in hostilities against the United States or its coalition partners;
- Has purposely and materially supported hostilities against the United States or its coalition partner; or
- Was a part of al Qaeda at the time of capture.

As of April 6, 2010, both bills remain in their respective committees of reference. Senate bill 3081 was referred to the Committee on the Judiciary and House Bill 4892 to three House committees – Intelligence, Armed Services, and Judiciary.

Similar legislation was introduced earlier this year in the U.S. Senate and House by Senator Lindsay Graham and Rep. Wolf, respectively. On February 2, 2010, both Senate bill 2977 and House Bill 4456 were introduced, prohibiting DOJ funds from being used for prosecuting individuals involved in the September 11, 2001, terrorist attacks. Both bills currently remain in their initial committees of reference. Prior to the introduction of these two measures, on November 5, 2009, an amendment to House Bill 2847 (Senate Amendment. 2669) by Senator Graham that would have prohibited the use of funds for the prosecution in Article III courts of individuals involved in the 9/11 terrorist attacks was tabled by the Senate when a *motion to table* was agreed to by a 54 to 45 vote, with one senator not voting.

Another bill that addresses the subject of this memorial was introduced January 19, 2010 by Rep. Buchanan. House Bill 4463, the Military Tribunals for Terrorists Act of 2010, would mandate military commissions as the only venue to try foreign nationals who:

- Engage or have engaged in conduct constituting an offense relating to a terrorist attack against persons or property in the U.S. or against any U.S. Government property outside the U.S. and
- Are subject to trial by a military commission under the law.

As of April 6, 2010, the bill remains in its first committee of reference, Judiciary, where it was referred to the subcommittee on the Constitution, Civil rights, and Civil Liberties on March 1, 2010.

According to the Congressional Research Service, "[in] the first session of the 111th Congress, several appropriations and authorizations measures were enacted which effectively barred funds from being used to transfer any detainee into the United States for release or purposes *other* than prosecution, and restrict funds from being used to transfer detainees into the country to face prosecution prior to the submission of certain reports to Congress." [3] [Emphasis supplied]

As a policy-making body, Congress considers policy research conducted by the Congressional Research Service (CRS), a legislative branch agency within the Library of Congress, tasked with providing non-partisan, objective, and authoritative information and analysis exclusively for members of Congress.[4] The following excerpts are from reports that were prepared by CRS and relate to federal law developments concerning the detention of unlawful enemy combatants and some of the policy issues that may arise from trying them in Article III, federal courts.

<u>Enemy Combatant Detainees</u>

> Following the terrorist attacks of 9/11, Congress passed the Authorization to Use Military Force (AUMF), which granted the President the authority "to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks" against the United States. As part of the subsequent "war on terror," many persons captured during military

[3] Congressional Research Service Research (CRS) Report RL33180, February 3, 2010, "Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court, " p. 39 (citing the following in footnote 227: Supplemental Appropriations Act, 2009 (P.L. 111-32), Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88), the Consolidated Appropriations Act, 2010 (P.L. 111-117), and the Department of Defense Appropriations Act, 2010 (P.L. 111-118)

[4] See, http://www.loc.gov/crsinfo/whatscrs.html for a description of the function and mission of the Congressional Research Service.

operations in Afghanistan and elsewhere were transferred to the U.S. Naval Station at Guantanamo Bay, Cuba for detention and possible prosecution before military tribunals. Although nearly 800 persons have been transferred to Guantanamo since early 2002, the substantial majority of Guantanamo detainees have ultimately been transferred to a third country for continued detention or release. . . .

. . . .

The decision by the Bush Administration to detain suspected belligerents at Guantanamo was based upon both policy and legal considerations. From a policy standpoint, the U.S. facility at Guantanamo offered a safe and secure location away from the battlefield where captured persons could be interrogated and potentially tried by military tribunals for any war crimes they may have committed. From a legal standpoint, the Bush Administration sought to avoid the possibility that suspected enemy combatants could pursue legal challenges regarding their detention or other wartime actions taken by the Executive. The Bush Administration initially believed that Guantanamo was largely beyond the jurisdiction of the federal courts, and noncitizens held there would not have access to the same substantive and procedural protections that would be required if they were detained in the United States.

The legal support for this policy was significantly eroded by a series of Supreme Court rulings permitting Guantanamo detainees to seek judicial review of the circumstances of their detention.[5]

After the U.S. Supreme Court held that U.S. courts have jurisdiction pursuant to 28 U.S.C. § 2241 [*habeas corpus*] to hear legal challenges on behalf of persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism (*Rasul v. Bush*), the Pentagon established administrative hearings, called "Combatant Status Review Tribunals" (CSRTs), to allow the detainees to contest their status as enemy combatants, and informed them of their right to pursue relief in federal court by seeking a writ of *habeas corpus*. Lawyers subsequently filed dozens of petitions on behalf of the detainees in the District Court for the District of Columbia, where district court judges reached inconsistent conclusions as to whether the detainees have any enforceable rights to challenge their treatment and detention.

Congress subsequently passed the Detainee Treatment Act of 2005 (DTA) to divest the courts of jurisdiction to hear some detainees' challenges by eliminating the federal courts' statutory jurisdiction over *habeas* claims (as well as other causes of action) by aliens detained at Guantanamo. The DTA provided for limited appeals of CSRT determinations or final decisions of military commissions. After the Supreme Court rejected the view that the DTA left it without jurisdiction to review a *habeas* challenge to the validity of military commissions in the case of *Hamdan v. Rumsfeld*, the 109th Congress enacted the Military Commissions Act of 2006 (MCA) (P.L. 109-366) to authorize the President to convene military commissions and to amend the DTA to further reduce detainees' access to federal courts, including in cases already pending.

In June 2008, the Supreme Court held in the case of *Boumediene v. Bush* that aliens designated as enemy combatants and detained at Guantanamo Bay have the constitutional privilege of *habeas corpus*. The Court also found that MCA § 7, which limited judicial review of executive determinations of the petitioners' enemy combatant status to that available under the DTA, did not provide an adequate *habeas* substitute and therefore acted as an unconstitutional suspension of the writ of *habeas*. The immediate impact of the *Boumediene* decision is that detainees at Guantanamo may petition a federal district court for *habeas* review of the legality and possibly the circumstances of their detention, perhaps including challenges to the jurisdiction of military commissions. President Barack Obama's Executive Order calling for a temporary halt in military commission proceedings and the closure of the Guantanamo detention facility is likely to have implications for legal challenges raised by detainees. Later this year,

[5] Congressional Research Service (CRS) Report R40139, January 22, 2009: "Closing the Guantanamo Detention Center: Legal Issues," pp. 1, 2. The report is available on the U.S. Dept. of State Website at http://fpc.state.gov/c34397.htm

[2010] the Supreme Court is expected to consider arguments in the case of *Kiyemba v. Obama* as to whether federal *habeas* courts have the authority to order the release into the United States of Guantanamo detainees found to be unlawfully held.

In March 2009, the Obama Administration announced a new definitional standard for the government's authority to detain terrorist suspects, which does not use the phrase "enemy combatant" to refer to persons who may be properly detained. The new standard is similar in scope to the "enemy combatant" standard used by the Bush Administration to detain terrorist suspects. The standard would permit the detention of members of the Taliban, Al Qaeda, and associated forces, along with persons who provide "substantial support" to such groups, regardless of whether such persons were captured away from the battlefield in Afghanistan. Courts that have considered the Executive's authority to detain under the AUMF and law of war have reached differing conclusions as to the scope of this detention authority. In January 2010, a D.C. Circuit panel held that support for or membership in an AUMF-targeted organization may constitute a sufficient ground to justify military detention.[6] [No footnotes in original summary]

. . . .

Whether detainees who are facing prosecution by a military commission may challenge the jurisdiction of such tribunals prior to the completion of their trial remains unsettled, although the district court has so far declined to enjoin military commissions. Supreme Court precedent suggests that *habeas corpus* proceedings may be invoked to challenge the jurisdiction of a military court even where *habeas corpus* has been suspended. *Habeas* may remain available to defendants who can make a colorable claim not to be enemy belligerents within the meaning of the MCA, and therefore to have the right not to be subject to military trial at all, perhaps without necessarily having to await a verdict or exhaust the appeals process. Interlocutory challenges contesting whether the charges make out a valid violation of the law of war, for example, seem less likely to be entertained on a *habeas* petition.[7]

Detainees' Rights in a Criminal Prosecution

While many persons currently held at Guantanamo are only being detained as a preventative measure to stop them from returning to battle, the United States has brought or intends to pursue criminal charges against some detainees. Various constitutional provisions, most notably those arising from the Fifth and Sixth Amendments to the U.S. Constitution, apply to defendants throughout the process of criminal prosecutions. Prosecuting the Guantanamo detainees inside the United States would raise at least two major legal questions. First, does a detainee's status as an "enemy combatant" reduce the degree of constitutional protections to which he is entitled? Secondly, would the choice of judicial forum – i.e., civilian court, military commission, or courts-martial – affect interpretations of constitutional rights implicated in detainee prosecutions?

. . . [T]he nature and extent to which the Constitution applies to noncitizens detained at Guantanamo is a matter of continuing legal dispute. Although the Supreme Court held in *Boumediene* that the constitutional writ of *habeas* extends to detainees held at Guantanamo, it left open the nature and degree to which other constitutional protections, including those relating to substantive and procedural due process, may also apply. The *Boumediene* Court noted that the Constitution's application to noncitizens in places like Guantanamo located outside the United States turns on "objective factors and practical concerns." The Court has also repeatedly recognized that at least some constitutional protections are "unavailable to aliens outside our geographic borders." The application of constitutional principles to the prosecution of aliens located at Guantanamo remains unsettled.

[6] Congressional Research Service (CRS) report RL33180, February 3. 2010: "Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court," see, Summary (no pagination).

[7] *Id.,* p. 53.

On the other hand, it is clear that if Guantanamo detainees are subject to criminal prosecution in the United States, the constitutional provisions related to such proceedings would apply. However, the application of these constitutional requirements might differ depending upon the forum in which charges are brought. The Fifth Amendment's requirement that no person be held to answer for a capital or infamous crime unless on a presentment or indictment of a grand jury, and the Sixth Amendment's requirement concerning trial by jury, have been found to be inapplicable to trials by military commissions or courts-martial. The application of due process protections in military court proceedings may also differ from civilian court proceedings, in part because the Constitution "contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." In the past, courts have been more accepting of security measures taken against "enemy aliens" than U.S. citizens, particularly as they relate to authority to detain or restrict movement on grounds of wartime security. It is possible that the rights owed to enemy combatants in criminal prosecutions would be interpreted more narrowly by a reviewing court than those owed to defendants in other, more routine cases, particularly when the constitutional right at issue is subject to a balancing test.

There are several forums in which detainees could potentially be prosecuted for alleged criminal activity, including in federal civilian court, in general courts-martial proceedings, or before military commissions. The procedural protections afforded to the accused in each of these forums may differ, along with the types of offenses for which the accused may be prosecuted. The MCA authorized the establishment of military commissions with jurisdiction to try alien "unlawful enemy combatants" for offenses made punishable by the MCA or the law of war, and affords the accused fewer procedural protections than would be available to defendants in military courts-martial or federal civilian court proceedings. Approximately 20 detainees at Guantanamo are currently facing charges before such commissions, though critics have raised questions regarding the constitutionality of the system established by the MCA. The MCA does not restrict military commissions from exercising jurisdiction within the United States, and the Supreme Court has previously upheld the use of military commissions against enemy belligerents tried in the United States. Although they have yet to be used for this purpose, detainees could also be brought before military courts-martial, which have jurisdiction over persons subject to military tribunal jurisdiction under the law of war via the Uniform Code of Military Justice (UCMJ). Detainees brought before military-courts martial could be charged with offenses under the UCMJ and the law of war, though courts-martial rules concerning the accused's right to a speedy trial may pose an obstacle to prosecution absent modification. Detainees could also potentially be prosecuted in federal civilian court for offenses under federal criminal statutes. Provisions in the U.S. Criminal Code relating to war crimes and terrorist activity apply extraterritorially and may be applicable to some detainees, though ex post facto and statute of limitation concerns may limit their application to certain offenses.[8] [Footnotes omitted]

B. SECTION DIRECTORY:

Not Applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

[8] Congressional Research Service (CRS) Report R40139, January 22, 2009: "Closing the Guantanamo Detention Center: Legal Issues," pp. 12, 13. The report is available on the U.S. Dept. of State Website at http://fpc.state.gov/c34397.htm

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The memorial does not require counties or municipalities to take an action requiring the expenditures of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES