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## Legislative Focus: Foreign Terrorist Military Tribunal Authorization Act of 2001

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## LEGISLATIVE FOCUS

### Foreign Terrorist Military Tribunal Authorization Act of 2001

by Erin Chlopak\*

On December 12, 2001, Congresswoman Jane Harman (D-CA) introduced H.R. 3468, the Foreign Terrorist Military Tribunal Authorization Act of 2001 (Act), which would authorize the president to convene military tribunals for trial outside the United States of persons who are neither U.S. citizens nor lawful resident aliens, and who are apprehended in connection with the September 11, 2001, terrorist attacks against the United States. The Act, currently pending in House of Representatives committees, would serve to codify the authority assumed by President George W. Bush in his Executive Order of November 13, 2001. The Executive Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (Executive Order), authorizes the trial of suspected terrorists by military commissions. The Act provides that military tribunals would be convened only outside the United States, and preserves broad executive authority to specify the location of the tribunals, the procedures to be employed, the suspects to be tried, and the offenses with which they will be charged. The Act requires that the president transmit to Congress and to the Foreign Intelligence Surveillance Court a semi-annual report specifying such details, and further provides that the report be unclassified “to the extent possible.” The Act also includes a sunset provision, terminating its authorization of military tribunals on December 31, 2005. Similar to President Bush’s Executive Order, the Act pertains to individuals suspected of planning, authorizing, committing, or aiding the September 11 attacks, as well as those suspected of harboring any organization or individual that planned, authorized, committed, or aided the attacks. The Act expressly preserves the right to petition for habeas corpus, providing that “[n]othing in any military order, executive order, regulation, or other directive of the executive branch may limit the rights or privileges of any individual . . . relating to habeas corpus.”

The legitimacy of trying suspected terrorists by military tribunals has been debated fervently since President Bush’s November decree. The Act, if passed, would partially rectify Bush’s apparent attempt to deny those convicted by a military tribunal the privilege “to seek any remedy or maintain any proceeding . . . in any court of the United States,” by expressly prohibiting the executive branch from limiting the constitutional writ of habeas corpus. Nevertheless, in limiting post-conviction remedies to habeas corpus, the Act passively sustains the Executive Order’s denial of the right to appeal a conviction by a military tribunal to an Article III court. The Act is also silent on a variety of other limitations embodied in the Executive Order concerning the procedural rights of suspected terrorists.

The Executive Order defines suspected terrorists as those whom the president determines “there is reason to believe” are or were members of *al Qaida*; engaged in, aided or abetted, or conspired to commit international

acts of terrorism; or knowingly harbored one or more individuals meeting such descriptions. The Act fails to define the standard of suspicion necessary to detain and try suspected terrorists in military tribunals, passively supporting the “presidential determination of a ‘reason to believe’” standard, which the Executive Order articulates. Such a standard falls outside the realm of the more familiar “probable cause” and “reasonable suspicion” benchmarks, and therefore lacks a basis for comparative evaluation, rendering its reliability questionable.

Additionally, although the Act requires that the president report to Congress on the procedures used in any military tribunal convened, it is silent on the broad procedural guidelines articulated in Bush’s Executive Order. Specifically, the Executive Order embraces all evidence “of probative value to a reasonable person,” including hearsay and evidence obtained in violation of the Fourth, Fifth, and Sixth Amendments to the Constitution; it provides for a determination of guilt by a two-thirds vote, as opposed to the unanimous verdict required in U.S. jury trials; and it also provides for a two-thirds vote for sentencing, including capital sentences. Even military court martial proceedings require a three-fourths vote for a life sentence and a unanimous vote to impose the death penalty.

The Act would passively sustain guidelines provided in President Bush’s Executive Order for trying suspected terrorists in military tribunals although they fail to meet international standards for criminal prosecutions. For example, Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which the U.S. ratified in 1992, provides that “[n]o one shall be subjected to arbitrary arrest or detention.” Similarly, it asserts, “[n]o one shall be deprived of his liberty except . . . in accordance with such procedures as are established by law.” The arrest and detention of individuals on the basis of President Bush’s personal determination that there is “reason to believe” they are terrorists; that they planned, authorized, committed, or aided the September 11 attacks; or that they harbored an organization or individual that so planned, authorized, committed, or aided, may well be arbitrary. Moreover, in diverging substantially from the procedures established under U.S. federal and constitutional law, and even from those established under U.S. military law for courts martial, the procedures set forth in Bush’s Executive Order violate the ICCPR.

In defense of military tribunals, President Bush has asserted that those who would be tried in such courts are “unlawful combatants who seek to destroy our country and our way of life.” Indeed, unlawful combatants, in contrast to prisoners of war, lack due process protections under the Geneva Conventions, which govern the laws of war. International treaties, such as the ICCPR, however, are not specific to certain persons, but rather protect the fundamental human rights of all persons. Moreover, the clas-

continued on page 36

Legislative Focus, continued from page 33

sification of detainees as unlawful combatants, and not prisoners of war, is a legal determination governed by the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). In particular, Article 45 of Protocol 1 articulates a presumption that a person who partakes in hostilities and falls into an adverse party's power is a prisoner of war, and therefore protected by the Third Geneva Convention "if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf . . . ." Additionally, Protocol 1 provides that where "any doubt arise[s] as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status, and therefore, to be protected by the Third [Geneva] Convention and this Protocol until such time as his status has been determined by a *competent tri-*

*bunal* (emphasis added)." Thus, President Bush's ad hoc decision that individuals, whose guilt he determines should be adjudicated by a military commission, are unlawful combatants is improper. An executive determination that detainees are unlawful combatants, rather than prisoners of war, may in some instances violate the guarantee of a judicial determination of such status codified in Protocol 1, and in graver instances, this executive determination could violate humanitarian protections guaranteed to prisoners of war by the Geneva Conventions. Importantly, trial by a military commission of persons wrongfully denied prisoner of war status would violate Article 106 of the Third Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, which provides that all prisoners of war have the right of appeal or petition from any sentence, in the same manner as members of the armed forces of the detaining power.

Prosecuting and punishing perpetrators of the September 11 attacks on the United States is undoubtedly an

important and formidable task. Sacrificing fundamental due process guarantees recognized under federal and international law, however, carries heavy consequences. Congressional authorization of military tribunals would constitute a great hypocrisy in light of U.S. criticism of military tribunals throughout the world, particularly those in Peru, where the U.S. Department of State criticized a military trial of an American accused of terrorism, demanding that the trial be held "in open civilian court with full rights of legal defense, in accordance with international judicial norms." In light of these potential legal and political consequences, it is critical that Congress take additional steps to regulate the procedures employed in military tribunals, and ensure that the U.S. effort to protect itself from terrorism does not result in seriously undermining U.S. credibility throughout the world. 🌐

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